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COMMENTS

CONSTITUTIONAL RIGHTS OF WOMEN UNDER NATIONAL AND INTERNATIONAL LAW: PRESENT STANDARDS & FUTURE POSSIBILITIES

INTRODUCTION

The American woman's struggle for equal rights can be viewed as part of a worldwide movement towards the recognition of equality between the sexes. On a broader scale, this worldwide movement is but one part of a trend aimed at eliminating discrimination in general. In addition to the initiatives taken within individual countries, nations have been collectively attempting to wipe out sex-based discrimination through multilateral action, most notably by means of international conventions.

In its analysis of this move towards equality, this comment will first examine the current status of women's rights as defined by American constitutional law. Following this discussion, it will briefly consider the impact the proposed Equal Rights Amendment (ERA) would have on this body of decisional law.

Thereafter, this comment will turn to the international arena focusing on existing international treaty law involving women's rights, as well as a draft convention which contemplates a sweeping prohibition of sex-based discrimination, similar in scope to the proposed ERA.

The purpose of this latter focus is to inform individuals interested in women's rights that there are international remedies—in addition to national ones—available in the struggle for equality. Although the United States has long refrained from becoming a party to these international treaties or conventions, there are signs that this reluctance is easing. Since United States recognition of these international standards will, hopefully, aid the movement for ERA ratification, it is more important than ever that individuals become aware of them. Also, if acceded to, these agreements will become an integral part of the law of the land, at which time their relevance becomes indisputable.

UNITED STATES CONSTITUTIONAL LAW

The scope of rights accorded women under the Constitution has been subject to varying interpretations by the United States Supreme Court during the past eleven decades. These high court decisions, customarily decided on equal protection grounds,¹ have been attacked for their lack of perspective concerning the harmful effects of sex discrimination, with at least one critic asserting that male judges decide these issues from a narrow viewpoint and under certain psychological handicaps.² However, the last several years have witnessed a greater recognition of the need for sexual equality, which has been met by a corresponding number of judicial decisions striking down sex-based classifications.

The Beginning: 1873-1970

In *Bradwell v. Illinois*,³ a woman's application for a license to practice law was denied solely on the grounds of sex. The Supreme Court, declaring that the right to practice law was not one of the privileges and immunities guaranteed by the fourteenth amendment, reasoned that the granting of licenses was solely within the jurisdiction of the individual states. In the Court's view, the individual states were free to define the prere-

1. Although sex discrimination cases are traditionally litigated using equal protection theory, the Court has upon occasion employed a different constitutional principle as the basis for its decisions. These other theories often reflect the era in which the case is decided: For example, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), was a privileges and immunities case involving a fourteenth amendment argument which no longer appears in the Court's decisions. Also, the Burger Court's "irrebuttable presumption" doctrine has been used to decide discrimination cases, although it has been argued that this theory is in essence equal protection under a different name. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972).

When federal statutes are challenged, the fourteenth amendment is inapplicable; however, "[w]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Frontiero v. Richardson*, 411 U.S. 677, 680 n.5 (1973) (quoting *Schneider v. Rusk*, 377 U.S. 163, 168 (1964)); see *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

2. Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675, 744-45 (1971). The authors list six reasons why male judges encounter difficulty seeing the harmful effect of sex discrimination: (1) lack of knowledge; (2) overgeneralization from personal experience; (3) personal attitudes of which they are not aware; (4) competition from women as a group may seem to threaten the judges' interests; (5) difficulty empathizing with female complainants; and (6) general hostility to change, especially of such a fundamental and far-reaching character as to transform radically the basic institutions of society. *Id.* at 741-44.

3. 83 U.S. (16 Wall.) 130 (1873).

quisites that must be satisfied to pursue a particular occupation.⁴ In the now-notorious concurring opinion of Mr. Justice Bradley, the "paramount destiny and mission of woman" was proclaimed:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.⁵

Although *Bradwell* has never been expressly overruled, it has since been established that the equal protection doctrine applies to state regulations of bar admissions; therefore, such arbitrary denial would now be unconstitutional.⁶ However, within the great expanse of nearly one hundred years following the *Bradwell* decision and up to the "turning point" marked by *Reed v. Reed*⁷ in 1971, the Supreme Court upheld all sex-based classifications. These decisions were marked by an almost reverent deference to the legislature, as evidenced by the cursory dismissal of challenges, raising even the most serious constitutional issues, on the basis of inadequately supported conclusions that a rational connection did exist between sex discrimination and the promotion of some vaguely articulated state interest.⁸

Statutes challenged during this period involved some restriction or denial of rights based solely on sex—rights which were not similarly curtailed with respect to the male gender

4. *Id.* at 139.

5. *Id.* at 141. In the only other case on the subject, *In re Lockwood*, 154 U.S. 116 (1894), a unanimous Court upheld Virginia's denial of bar membership to a woman who had already been admitted to the District of Columbia and U.S. Supreme Court bars.

6. Johnston & Knapp, *supra* note 2, at 681.

7. 404 U.S. 71 (1971).

8. The judiciary has traditionally used several forms of rationalization to uphold state legislation that excludes or disadvantages females with respect to various occupations or offices. These include: (1) reliance on the myth of male supremacy; (2) total deference to the legislature; (3) cursory dismissal of serious constitutional issues on the basis that a rational connection exists between sex discrimination and the promotion of a state interest. Johnston & Knapp, *supra* note 2, at 697. In addition, courts have often based decisions on "averaging," doing gross injustice to those individuals who are not "average." B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 105 (1975) [hereinafter cited as *BABCOCK*].

and were important elements in one's daily existence. Typical among these rights were the choice of certain occupations,⁹ the corresponding right to equal educational opportunity,¹⁰ and the right to be considered on an equal basis in the jury-selection process.¹¹ Because the sex-based classification was always upheld, Supreme Court performance during this period has been rated by one scholar as "poor to abominable."¹²

The Turning Point and Beyond: 1971-1977

Sex-based classifications. Legal scholars have strongly maintained that sex-based classifications should be subjected to a stricter scrutiny than that which is mandated by the traditional rational relationship test.¹³ If strict scrutiny were applied, the state would have to show a compelling reason for distinguishing between males and females.

Race is the classic suspect classification, and one of the most oft-cited arguments for applying strict scrutiny to sex-based classifications is that gender can be analogized to race.¹⁴ Most authorities do acknowledge that there are areas—e.g.,

9. See *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding statute that denied most women the right to work as bartenders); *In re Lockwood*, 154 U.S. 116 (1894) (denying women the right to practice law). Cf. *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (Alcoholic Beverage Commission's revocation of liquor license from establishment for hiring female bartenders violates equal protection clause and is therefore unconstitutional).

10. In *Williams v. McNair*, 316 F. Supp. 134 (D. S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971), the Court stated that equal protection had not been violated where men were denied admission to an all-female state college, where there were coeducational universities within the system. Cf. *Kirstein v. Rector & Visitors of the Univ. of Va.*, 309 F. Supp. 184 (E.D. Va. 1970) (Univ. of Va.'s denial to females of educational rights equal to those of males violates equal protection clause).

11. *Hoyt v. Florida*, 368 U.S. 57 (1961) (sustaining statute allowing women to be excluded from jury duty unless they sign up).

12. Johnston & Knapp, *supra* note 2, at 675. In contrast, cases decided between 1971 and 1974 were rated by Professor Johnston as "acceptable to inexcusably poor"; the 1974 term as "tolerable to good." Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U. L. Rev. 617 (1974); Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U.C.L.A. L. Rev. 235 (1975) [hereinafter cited as Johnston-1975].

13. The rational relationship or reasonableness test traditionally asks: (1) Did the legislature have a constitutionally-permissible purpose in view in passing the law in question, and (2) Is the classification used reasonably related to accomplishing that purpose? Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). Stated another way, "A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law." *Id.* at 346.

14. BABCOCK, *supra* note 8, at 89. See also Johnston & Knapp, *supra* note 2, at 738-41; Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?* 84 HARV. L. REV. 1499, 1507-08 (1971).

laws governing sexual conduct and familial relationships—where societal interests may arguably command a distinction based on sex though not on race. However, in the areas of education, employment, and the judicial process, where inherent sexual or racial differences are not relevant, the sex-race parallel is persuasive.¹⁵

The arbitrary character of sex-based classifications is evident if one substitutes “race” for “sex” in a challenged statute. In *Reed v. Reed*,¹⁶ the issue presented was whether the Idaho legislature could validly give preference to males over females in the appointment of administrators of estates. If such preference had been accorded caucasians, the invidiousness of the statute becomes immediately apparent and it would never be permitted to stand.¹⁷

However, even without a strict scrutiny analysis, the *Reed* Court struck down the sex-based classification. Rejecting the contention that the statute decreased the workload of probate courts by saving them time in choosing an administrator,¹⁸ Chief Justice Burger stated:

To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the equal protection clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intra-family controversy, the choice in this context may not lawfully be mandated solely on the basis of sex¹⁹

This decision marks the first time the Court invalidated a statute on grounds of sex-based discrimination.²⁰ What level of scrutiny did the Court apply to achieve this breakthrough? While the Court appeared to employ traditional rational relationship terminology, the majority demanded more of the legislature than a plausibly conceivable purpose. The majority stated that the classification was “subject to scrutiny” and,

15. Johnston & Knapp, *supra* note 2, at 741.

16. 404 U.S. 71 (1971).

17. Johnston & Knapp, *supra* note 2, at 696-97.

18. The Idaho Supreme Court had accepted this administrative efficiency rationale. See *Reed v. Reed*, 93 Idaho 511, 465 P.2d 635 (1970).

19. 404 U.S. at 76-77.

20. It is noteworthy that *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971), had preceded *Reed* by six months, supporting the proposition that *Sail'er Inn* and other state cases helped pave the way for *Reed*.

although acknowledging that the saving of the judiciary's time could be considered a rational legislative purpose, ruled that this rationale was not sufficient to uphold the statute's constitutionality.²¹ Thus, it appears that the new test applied a more stringent standard than warranted under traditional rational relationship analysis. However, it was something more lenient than a compelling state interest, which the acceptance of a race-sex analogy would have demanded.²²

In 1973, the question of the validity of sex-based classifications was once again before the Court in *Frontiero v. Richardson*.²³ Here the issue turned on the right of a female member of the uniformed services to claim her spouse as a "dependent" for purposes of obtaining increased benefits, a right granted male members of the services.²⁴ Justice Brennan, writing for four members of the Court,²⁵ followed *Reed* by rejecting a defense of the statute based upon administrative efficiency.²⁶ However, he broke new ground when he declared that sex, like "classifications based upon race, alienage or national origin, [is] inherently suspect, and must therefore be subjected to strict judicial scrutiny."²⁷

In accepting the race-sex analogy, Justice Brennan further reasoned that sex, like race and national origin, was an "immutable characteristic determined solely by the accident of birth."²⁸ In addition, Title VII and the ERA were cited to suggest that Congress had itself concluded that sex-based classifications were inherently invidious, a factor which the majority found quite significant.²⁹

It is regrettable that Justice Brennan's view has never commanded more than the four votes it summoned in *Frontiero*. Thus, as far as United States constitutional precedent is concerned, it never enjoyed the recognition of a majority

21. 404 U.S. at 76.

22. Professor Gunther has labeled this middle level of scrutiny "rational relationship with a bite." Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-19 (1972).

23. 411 U.S. 677 (1973).

24. *Id.* at 678.

25. Justices Brennan, Douglas, White, and Marshall constituted the majority.

26. 411 U.S. at 684.

27. *Id.* at 682.

28. *Id.* at 686 (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

29. *Id.* at 687-88 (citing 42 U.S.C. § 2000e-2(a), (b), (c) (Title VII); H.R.J. Res. 208, 92d Cong., 2d Sess. (1972) (Equal Rights Amendment)).

of the Court.³⁰ Although *Frontiero* had but one dissenter,³¹ the four concurring justices declined to recognize sex as a suspect classification.³²

The conflicting standards of scrutiny developed in *Reed* and *Frontiero* have been further complicated by subsequent adjudication. Although it is generally conceded that Supreme Court review of sex-discrimination cases has greatly improved during the seventies,³³ progress has been slow and uneven. An examination of the Court's more recent decisions reveals a lack of consensus on the mode of analysis that should be applied as well as an absence of a principled basis for determining exactly what types of governmentally-ordered discrimination are sex-based.³⁴ The following discussion highlights the conflicting aspects of the Court's post-*Frontiero* analysis.

Irrebuttable presumptions. Initially, in 1974 and 1975, the Supreme Court decided two cases involving sex-based classifications on grounds other than equal protection. In the first, *Cleveland Board of Education v. LaFleur*,³⁵ the Court struck down a school board regulation that required teachers to take mandatory maternity leave for a specified period during the pregnancy. The Court reasoned that this rule contained an irrebuttable presumption of physical incapacity, which applied regardless of an individual woman's ability to continue working.³⁶ Since the regulation did not provide for an individualized determination of the teacher's ability to adequately perform her duties, the Court found this infringed the teacher's right to procedural due process. The Court also commented that by penalizing the pregnant teacher, the provisions in question might influence the decision as to whether to have children, thereby impinging on the fourteenth amendment due process

30. In contrast to the United States Supreme Court, the California Supreme Court in *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 20, 485 P.2d 529, 541, 95 Cal. Rptr. 329, 341 (1971), declared that sex is a suspect classification.

31. Justice Rhenquist, dissenting in *Frontiero*, agreed with the district court that administrative efficiency was a valid legislative purpose. 411 U.S. at 69.

32. Justice Stewart stated that the statutes in question worked an invidious discrimination. *Id.* at 691. Justice Powell's concurring opinion was joined by Chief Justice Burger and Justice Blackmun. This opinion stated that since *Reed* did not label sex a suspect classification, such expansion should be reserved for the future; furthermore, since the Equal Rights Amendment was pending in state legislatures, the Court should not "pre-empt a major political decision." *Id.* at 692.

33. For one commentator's view, see Johnston-1975, *supra* note 12.

34. *Id.* at 235.

35. 414 U.S. 632 (1974).

36. *Id.* at 644.

rights which guarantee freedom of personal choice in matters of marriage and family life.³⁷

This irrebuttable presumption doctrine, apparently the creation of the Burger Court, had been used on occasion before *LaFleur*, in one instance to strike down a state statute denying an unmarried father the right to a hearing on parental fitness before his children were taken from him.³⁸ Regarded by commentators variously as substantive due process,³⁹ procedural due process,⁴⁰ or equal protection⁴¹ in disguise, the irrebuttable presumption theory has not been looked upon favorably. Thus the fact that it has not appeared in the Court's most recent decisions has been greeted with some relief.⁴²

A second case which did not mention equal protection was *Taylor v. Louisiana*.⁴³ In *Taylor*, the Court struck down a state statute which placed women on petit jury rolls only if they had taken some positive action to be considered. The Court found that the challenged statute violated a defendant's sixth and fourteenth amendment rights to a jury drawn from a cross-section of the community.⁴⁴ Therefore, *Taylor* appeared to overrule an earlier decision which had held that a woman's role as the center of home and family life rendered such legislative reasoning rational.⁴⁵

Equal protection. Turning to equal protection, it seems clear from *Geduldig v. Aiello*,⁴⁶ that sex-discrimination cases involve definitional problems: *i.e.*, when is a classification sex-based? In *Geduldig*, the Court upheld a California disability

37. *Id.* at 639-40. The right to privacy in matters of marriage and family life was firmly recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (married persons have right to birth control and family planning information). The *Griswold* theory has been further expounded in later cases. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion during first trimester); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right of unmarried individuals to contraceptives and related information); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry person of one's choice, regardless of race).

38. *Stanley v. Illinois*, 405 U.S. 645 (1972).

39. *E.g.*, Sewell, *Conclusive Presumption and/or Substantive Due Process of Law*, 27 OKLA. L. REV. 151 (1974).

40. *E.g.*, Note, *Irrebuttable Presumptions As An Alternative to Strict Scrutiny: from Rodriguez to LaFleur*, 62 GEO. L.J. 1173, 1176 (1974).

41. Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1547 (1974); Choper, Forrester, Gunther & Kurkland, *Equal Protection and the Burger Court*, 2 HAST. CONST. L.Q. 645 (1975).

42. Johnston-1975, *supra* note 12, at 261.

43. 419 U.S. 522 (1975).

44. *Id.* at 525.

45. *Hoyt v. Florida*, 368 U.S. 57 (1961).

46. 417 U.S. 484 (1974).

plan that exempted from coverage any work loss resulting from normal pregnancy on the ground that such exclusion was not sex-based. The Court reasoned that such a plan was merely removing one physical condition—pregnancy—from the list of compensable disabilities.⁴⁷ Bolstering its argument that sex-based discrimination was not at issue, the Court found that the classification did not even involve men and women; rather, the two categories were pregnant women and nonpregnant persons.⁴⁸ Following this premise, it was a simple matter to uphold the exclusion of normal pregnancy on the theory that the addition of such a disability to the program's coverage would greatly increase costs.⁴⁹

In his dissent, Justice Brennan noted that gender-linked disabilities peculiar to men had not been excluded from the plan and that the state therefore had created a double standard which constituted sex-based discrimination.⁵⁰ In addition, the Justice called attention to the majority's "apparent retreat" back to traditional rational relationship analysis.⁵¹

Although *Geduldig* has been widely criticized,⁵² in *General Electric Co. v. Gilbert*,⁵³ the Court sustained a similar disability plan attacked under Title VII.⁵⁴ The Court considered *Geduldig*'s equal protection analysis "relevant" in determining what Congress meant by discrimination. Based on these considerations, the Court held that absent a showing of an invidious intent to discriminate against one sex or the other, "lawmakers are constitutionally free to include or exclude pregnancy . . . on any reasonable basis . . ."⁵⁵

47. *Id.* at 496 n.20.

48. *Id.*

49. *Id.* at 496.

50. *Id.* at 501.

51. *Id.* at 503.

52. For criticisms of *Geduldig* see Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532 (1974); Coleman, *Barefoot and Pregnant—Still*, 16 S. TEX. L.J. 211 (1975); Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 411 (1975).

53. 429 U.S. 125 (1976). The program in *Geduldig* was funded entirely from employees' wages, whereas in *Gilbert*, the total compensation package was furnished by the company. *Id.* at 129.

54. 42 U.S.C. §§ 2000e to 2000e-15 (1970). Title VII prohibits discrimination upon the basis of sex as well as other grounds.

55. 429 U.S. at 134-35 (emphasis added). Once again dissenting, Mr. Justice Brennan noted that, in addition to repudiating the applicable guidelines, the *Gilbert* holding rejected the unanimous conclusion of all six courts of appeals that had addressed the question. *Id.* at 147. See *Nashville Gas Co. v. Satty*, 98 S. Ct. 347 (1977).

Nashville Gas represents the latest pronouncement on the pregnancy-employment

Secondary sex characteristics. The balance of the post-*Frontiero* decisions dealing with sex-based discrimination have involved discrimination on the basis of non-unique or "secondary" sex characteristics.⁵⁶ Concerning age differentials based on sex, it appears that the Court has encountered little difficulty when called upon to strike down these statutes as being violative of equal protection.

In *Stanton v. Stanton*,⁵⁷ the Court overruled a child support differentiation establishing the age of majority at eighteen for girls and twenty-one for boys. Reasoning that the distinction was based on old sexist notions that higher education was a necessity only for males, the Court held that the statute constituted an equal protection violation under *any* test.⁵⁸ Though this conclusion is justified, the Court's reasoning certainly did not contribute to the articulation of a definite standard to be applied in sex discrimination cases.

The lack of a definite standard problem was partially clarified in another differential case, *Craig v. Boren*.⁵⁹ The issue presented was the validity of an Oklahoma statute prohibiting the sale of 3.2% beer to males under the age of twenty-one and females under the age of eighteen. Faced with the challenge that the statute impermissibly discriminated against males, the Court held it violative of equal protection. In so doing, the Court seemingly applied a middle level of scrutiny: gender-based classifications were required to serve important governmental objectives and had to be substantially related to the achievement of those objectives.⁶⁰ Here, the statistical evidence

benefits issue. The majority, relying on *Gilbert*, found that an employer's denial of maternity-leave pay was not per se a violation of Title VII, and remanded the case for a determination of whether the exclusion of pregnancy was "a mere pretext designed to effect an invidious discrimination against members of one sex or the other." *Id.* at 353. The majority also concluded that *Nashville Gas'* policy of denying employees returning from pregnancy leave their accumulated seniority acted to "deprive them of employment opportunities" and "adversely affect their status as an employee" in violation of Title VII. *Id.* at 350.

56. The Supreme Court decisions involving pregnancy and employment remain the only cases dealing with characteristics unique to one sex. Since such attributes would be excluded from the ERA's mandate of complete sexual neutrality, it remains a crucial task for the Court to articulate exactly what sorts of discrimination are sex-based, and what form of equal protection analysis to apply.

57. 421 U.S. 7 (1975).

58. *Id.* at 17.

59. 429 U.S. 190 (1976).

60. *Id.* at 197. In a footnote, the Court mentioned that the traditional rational relationship test as articulated in *Goesaert v. Cleary*, 335 U.S. 464 (1948), should be considered overruled to the extent that it was inconsistent with this holding. 429 U.S. at 210 n.23.

as to the incidence of drunken driving among males and females between the ages of eighteen and twenty-one did not demonstrate a sufficient disparity to justify the discrimination against males in order to achieve the governmental objective of traffic safety.⁶¹

In his dissent Justice Rehnquist pointed out that this was the first time that the Court had applied an elevated level of scrutiny to invalidate a statutory discrimination harmful to males, except where the statute impaired an important personal interest protected by the Constitution.⁶² Since no evidence was presented to support a conclusion that males in this age group were in any way historically disadvantaged, he argued, there was no support for the invocation of strict scrutiny and the traditional rational relationship test should be the applicable standard.⁶³

Apart from the differential treatment setting, the Court has been slower to abandon the rational relationship test, at least in ameliorative discrimination cases. In *Kahn v. Shevin*,⁶⁴ a 1974 decision, the Court held that a Florida law providing a property tax exemption for widows but not widowers did not constitute a violation of equal protection. The basis for this holding, amply supported by statistical data,⁶⁵ was the "overt discrimination . . . of a male-dominated culture, the job market [being] . . . inhospitable to the woman seeking any but the lowest paid jobs" ⁶⁶ Thus, the statute was given no more than minimal scrutiny and its remedial purpose was considered rational enough for its continuance.

Although *Kahn v. Shevin* has frequently been denounced as a step backwards from the recognition in *Frontiero* that sex-based classifications should be viewed with suspicion,⁶⁷ the following term, in *Schlesinger v. Ballard*,⁶⁸ the Supreme Court

61. *Id.* at 200.

62. *Id.* at 219. To demonstrate when a fundamental interest affecting males should demand a higher level of scrutiny, Mr. Justice Rehnquist used *Stanley v. Illinois*, 405 U.S. 645 (1972), as an example. See text accompanying note 38, *supra*.

63. 429 U.S. at 219.

64. 416 U.S. 351 (1974).

65. *Id.* at 353 n.4 & n.5. It is interesting to note that the difference in earnings between the sexes had increased by six percentage points between 1955 and 1972.

66. *Id.* at 353.

67. For a forceful critique of *Kahn*, see B. BABCOCK, *supra* note 8, at 123-24, where the authors point out that the dangers of allowing remedial discrimination may very likely more than outweigh its benefits.

68. 419 U.S. 498 (1975). The *Ballard* Court was sharply divided, as evidenced by its 5-4 decision. *Id.* at 499. The majority opinion in *Kahn* commanded 6 votes. 416 U.S. at 351.

reaffirmed its view that compensatory discrimination favoring women constituted a valid legislative purpose. The Court rejected a challenge to a federal statutory scheme requiring discharge of male military officers passed over twice for promotion after nine years of service and female officers only after thirteen years. The Court noted that female line officers had fewer opportunities for promotion since they were not assigned to combat and most sea duty. As a result, the Court reasoned that Congress could quite rationally have believed that the sex-based differentiation was consistent with the goal of providing women officers with a fair and equitable career advancement program.⁶⁹ The opinion therefore skirted the whole issue of why the so-called compensatory legislation was necessary at all.⁷⁰ The Court's unwillingness to confront the assumption that women are unfit for combat strips the holding of its logical foundation. Also, the decision did nothing to dissipate the confusion regarding remedial discrimination created by *Kahn*.⁷¹

Shortly after *Ballard* was announced, the Court decided *Weinberger v. Wiesenfeld*,⁷² wherein a Social Security Act provision, which paid survivor benefits to the widow of a male wage-earner but not to the widower following the death of a deceased female wage-earner, was deemed to violate equal protection.⁷³ Justice Brennan, writing for a unanimous Court, found this gender-based distinction indistinguishable from *Frontiero*, reasoning that it was unconstitutional to deny women workers the protection for their families that they had

69. 419 U.S. at 508.

70. *Id.* However, the Court offered an explanation: "Appellee has not challenged the current restriction on women officers' participation in combat and most sea duty." *Id.*

71. See Johnston-1975, *supra* note 12, at 236-44, for a discussion of *Ballard*. In his article, Professor Johnston states what he feels are the faults of the *Ballard* rationale. First, he questions whether a less drastic alternative may have been available, and thereafter inquires into the sufficiency of compensatory discrimination to remedy the constitutional deficiency of the prohibition against assigning women to combat and sea duty. However, neither of these crucial factors was dealt with in the opinion. 419 U.S. at 508.

The validity of benign discrimination in the racial context was successfully challenged in *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *cert. granted*, 429 U.S. 1090 (1977). If the Supreme Court rules that ameliorative racial discrimination is constitutionally impermissible, the *Kahn-Ballard* rationale will presumably also fall.

72. 420 U.S. 636 (1975).

73. *Id.* at 638-39. Under the existing Social Security provisions, minor children of either the surviving widow or widower would have been eligible for the benefits. *Id.* at 643-44.

paid for on an equal basis with male wage-earners. Such a statute, Brennan stated, was based upon the "archaic and overbroad generalization" that a male worker's earnings are essential to his family's subsistence whereas his female counterpart's are not.⁷⁴

The Court went on to reject the *Kahn* rationale that the classification in question was benign—designed to compensate women beneficiaries for the difficulty they confront when required to support themselves and their families.⁷⁵ Indicating that a stricter standard than that propounded by the rational relationship test was called for, the Court stated: "[the] mere recitation of a benign, compensatory purpose is not an automatic shield which protects any inquiry into the actual purposes underlying a statutory scheme."⁷⁶

In *Califano v. Goldfarb*,⁷⁷ the Supreme Court's most recent decision dealing with this subject, a sharply divided Court⁷⁸ struck down another Social Security Act provision. This provision required the widower, but not the widow, to prove actual dependency in order to qualify for survivor's benefits based upon the earnings of a deceased spouse.⁷⁹ The majority opinion upheld the district court's conclusion that the statute in question constituted an invidious discrimination against female wage earners by affording them less protection for their surviving spouses than was provided for male employees.⁸⁰ The Court cited *Frontiero* and *Wiesenfeld* as controlling; furthermore, it stated that the legislative intent was based upon the "unverified assumption that it would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes."⁸¹

Justice Rehnquist wrote a dissenting opinion, joined by three other justices.⁸² He viewed *Kahn* as controlling and explained the sex-based differentiation as "a measure to amelio-

74. *Id.* at 642-43.

75. *Id.* at 648.

76. *Id.*

77. 430 U.S. 199 (1977).

78. *Goldfarb* was a 5-4 decision. The majority opinion, written by Justice Brennan, was joined by only three of the other justices (White, Marshall, and Powell). *Id.* at 200.

79. The Social Security Act provision under attack was 42 U.S.C. § 402 (f)(1)(D) (Supp. V 1975). *Id.* at 202.

80. *Id.* at 216-17.

81. *Id.* at 217.

82. *Id.* at 224. Mr. Justice Rehnquist was joined in his dissenting opinion by the Chief Justice and Justices Stewart and Blackmun. *Id.*

rate the characteristically depressed condition of aged widows."⁸³ Given this empirically shown condition, Rehnquist found that "administrative convenience" provided a rational basis for the statute.⁸⁴

In a concurring opinion, Justice Stevens attempted to reconcile the two different lines of cases cited by the majority and dissenting opinions. Aware of the inconsistency between *Kahn* and *Wiesenfeld*, Stevens stated that the latter unanimous holding should be followed rather than the earlier, sharply-divided ruling.⁸⁵ Unfortunately, the conflict in the two lines of reasoning was discussed by only one justice. These incompatible precedents make unclear the fate of any statute that makes a differentiation or amelioration based on sex.

As the foregoing case analysis indicates, the Court has failed to provide a concrete methodology for identifying and analyzing claims of ameliorative discrimination.⁸⁶ Nevertheless, it appears certain that statutory distinctions based upon gender will be given more than minimal scrutiny. Similarly, it is clear that a majority of the Court will not apply a compelling interest analysis to these cases. Finally, as evidenced by *Craig*, *Stanton*, *Wiesenfeld*, and *Goldfarb*, the Court seems ready to strike down certain legislation regardless of whether the discriminatory impact is felt by men or women. Conversely, statutes dealing with characteristics unique to one sex, such as the pregnancy disability in *Geduldig*, have not received the benefit of a heightened level of scrutiny.

Therefore, although the Court has displayed an increasing sensitivity to governmental classifications based upon sex, several of the more recent cases remain difficult to reconcile. Whether this situation arises from a failure to articulate a principled basis for determining exactly what sorts of discrimination are sex-based, or a failure to reach a consensus on the mode of equal protection analysis that should apply, confusion and uncertainty remain. Due to these factors, it may be that only with the advent of a constitutional amendment will a truly adequate basis for the eradication of sex-based discrimination be realized.

83. *Id.* at 242.

84. *Id.*

85. *Id.* at 224.

86. Johnston-1975, *supra* note 12, at 260.

THE EQUAL RIGHTS AMENDMENT

If the long-embattled Equal Rights Amendment⁸⁷ is ratified by the requisite number of states,⁸⁸ gender-based classifications will be unconstitutional, and sex will become a prohibited legislative criterion. Since the best that equal rights advocates can expect from equal protection analysis is the classification of sex as a suspect criterion, supporters have long urged that the only truly effective means of eradicating sex-based discrimination is by means of a constitutional amendment.

The ERA is regarded by its proponents as a measure that, with two exceptions, would prohibit sex from being used as a factor in determining the legal rights of men and women.⁸⁹ These two exceptions arise when compelling social interests override the general premise that all laws must be sex-neutral. One exception relates to personal privacy; the other concerns physical characteristics unique to one sex.⁹⁰

Pursuant to the first exception, the ERA would have to be applied in a manner consistent with the constitutional guarantee of individual privacy. The scope of the right of privacy in the area of equal rights would depend upon the mores of the current community; thus, rules would be ever changing. However, as a general principle, it can be stated that the right of privacy would mandate separate but equal facilities for disrobing, sleeping or performing personal bodily functions in the presence of the other sex.⁹¹

The other exception to the amendment concerns statutes based on physical characteristics unique to one sex. Although laws dealing with such characteristics are rare, they are generally founded on strong state interests. Thus, laws punishing

87. The Equal Rights Amendment states:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

H.R.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. 24935 (1971); S.J. Res. 8, 92d Cong., 1st Sess., 117 CONG. REC. 271 (1971).

88. Thirty-eight states must ratify the ERA before it becomes law. At the time of publishing, thirty-five states have done so.

89. See generally Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 889 (1971); see also K. DAVIDSON, R. GINSBURG & H. KAY, *CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* 108 (1974).

90. S. REP. NO. 92-689, 92d Cong., 2d Sess. 12-13 (1972).

91. Brown, *supra* note 89, at 901.

forcible rape would remain in effect as would, for example, legislation relating to the determination of fatherhood and leaves of absence for child bearing.⁹²

Aside from these two rather limited qualifications, the ERA would prohibit laws from classifying by sex instead of by the characteristics and abilities of the individual person that are relevant to the differentiation. This means that the benign quota approach of *Kahn* and *Ballard* would not be allowed.⁹³ Similarly, "separate but equal" facilities would not be permitted unless they fit into one of the previously mentioned exceptions or did not arouse public concern.⁹⁴

Much of the ERA's application would be obvious and direct. The outcome of cases previously discussed dealing with jury law exemptions,⁹⁵ the right of women to enter certain occupations and professions⁹⁶ or act as trustees or executors,⁹⁷ age differentials,⁹⁸ and government benefit programs⁹⁹ would all require the abolition of any double standard. In this regard, the amendment would have a uniform and far reaching effect, limited only by the requirement of state action.¹⁰⁰

Concerning this requirement, a problem arises in determining what should be viewed as part of the public sector. In this sector, differing treatment on account of sex would be impermissible, while such treatment would be constitutional in the private sector.¹⁰¹ Generally, facilities which affect the public concern or are financed by a federal or state government would be subject to the mandate of the ERA. Depending upon

92. *Id.* at 894.

93. See notes 64-71 and accompanying text *supra*.

94. Brown, *supra* note 89, at 909.

95. See *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Hoyt v. Florida*, 368 U.S. 57 (1961); notes 43-45 and accompanying text *supra*.

96. See *Goesart v. Cleary*, 335 U.S. 464 (1948); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873); notes 3-5, 9 and accompanying text *supra*.

97. See *Reed v. Reed*, 404 U.S. 71 (1971); notes 16-22 and accompanying text *supra*.

98. See *Craig v. Boren*, 429 U.S. 190 (1976); *Stanton v. Stanton*, 421 U.S. 7 (1975); notes 56-63 and accompanying text *supra*.

99. *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); notes 23-32, 64-66, 72-85 and accompanying text *supra*.

100. Brown, *supra* note 89, at 905. In this article, the authors list two concepts of state action: (1) the existence of state action depends upon the nature and degree of state involvement; (2) state action depends upon the function being performed. From these two concepts, the authors conclude that "state action" takes place in the public sector of society and not in the private sector. *Id.*

101. *Id.* at 906.

the nature of the activity involved, however, separation of the sexes in the private sector would not be foreclosed.¹⁰²

The amendment's potential impact in three areas has dominated the literature pro and con: protective labor legislation, family support laws, and military service.¹⁰³ With respect to labor legislation, the courts' and agencies' interpretation of Title VII and its various state analogies have largely dulled the impact the proposed constitutional amendment would have in the area.¹⁰⁴ For example, the Equal Employment Opportunity Commission has already taken the position that many laws originally promulgated for the purpose of protecting women are in conflict with Title VII. The Commission views these laws as discriminatory because they do not take into account an individual female's capacities and preferences.¹⁰⁵ Despite these views, the ERA could still be used to fill any gaps left by existing legislation.

Since protective labor legislation would have to be reconsidered in light of the ERA, state laws, like the one discussed in *LaFleur*,¹⁰⁶ providing for compulsory maternity leaves would merit attention. Although it could be argued that these laws and regulations deal with unique physical characteristics of women, such statutes would require careful judicial review. The regulation would fail if the state could not show the exist-

102. *Id.* at 903.

103. K. DAVIDSON, *supra* note 89, at 109-10; see generally Brown, *supra* note 89, at 922-78.

104. K. DAVIDSON, *supra* note 89, at 109. See, e.g., Freund, *The Equal Rights Amendment is Not the Way*, 6 HARV. C.R.-C.L. L. REV. 234, 242 (1971). Labor groups have often opposed the Amendment because it was thought that the Amendment would deprive working women of important gains achieved only after hard-fought battles in the late nineteenth and early twentieth centuries. Brown, *supra* note 89, at 922.

It is also noteworthy that Title VII's bona fide occupational qualification is an exception to the statute's absolute prohibition against sex-based classifications in much the same way as the ERA's exception for unique physical characteristics. *Id.* at 926.

105. See EEOC Regulations, 29 C.F.R. § 1604.1(a)(2) (1970) (issued Aug. 19, 1969). It has been noted that the EEOC position is consistent with the view of ERA proponents, which was first explained in the 1920's and reiterated in virtually all discussions in support of the amendment since then. Laws setting health and safety standards "should be enacted for all workers . . . Legislation that includes women but exempts men . . . limits the woman worker's scope of activity . . . by barring her from economic opportunity. Moreover, restrictive conditions [for women but not for men] fortifies the harmful assumption that labor for pay is primarily the prerogative of the male." K. DAVIDSON, *supra* note 89, at 109.

106. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). See notes 35-37 and accompanying text *supra*.

ence of a "problem" of legitimate legislative concern and sufficiently close relationship between the problem and the physical characteristics in question.¹⁰⁷

Under the ERA, compulsory maternity leave regulations would be invalidated for two reasons. First, pregnancy is simply one of a large number of temporary disabilities. Thus, it could not validly be singled out for separate constitutional treatment. Second, even if maternity leave in general is based on a compelling state interest, the imposition of compulsory leave would be impermissible. A rule letting a woman and her doctor decide if optional leave is necessary would clearly be a less onerous alternative solution. In other words, a *LaFleur* type regulation discriminatorily singles out a small sex-linked category of a larger field of temporary disabilities and imposes a more drastic solution than is necessary.¹⁰⁸

If the singling out of pregnancy can be regarded as discriminatory, the Court's holdings in *Geduldig* and *Gilbert*, dealing with disability benefit programs that exclude normal pregnancy from coverage, would be overturned unless the proponents of such programs could meet the almost insurmountable burden of proving that the total exclusion of this sex-based disability was the least drastic alternative available to them.

A second source of controversy surrounding passage of the ERA deals with domestic relations law, and family support laws in particular. The only restriction which the ERA would put on legislatures would be the requirement that laws be drafted in sex-neutral terms. Since the modern trend has been toward the elimination of all differentiations based on sex,¹⁰⁹ the only effect of the ERA would be to move the law along more quickly in the direction in which it is already going.¹¹⁰

The question of the status of women in relation to the military has probably generated more controversy than any other issue surrounding ratification of the ERA.¹¹¹ As currently

107. See Brown, *supra* note 89, at 930-32.

108. *Id.* at 932; *Schattmen v. Texas Employment Comm'n*, 459 F.2d 32 (5th Cir.), *cert. denied*, 409 U.S. 1107 (1972), *rehearing denied*, 410 U.S. 959 (1973).

109. See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT (Final Draft, 1970). See K. DAVIDSON, *supra* note 89, at 109. See also Brown, *supra* note 89, at 937.

110. Brown, *supra* note 89, at 937. The authors of this article astutely observe that in the area of domestic relations law, social customs, economic realities and individual preferences have a far greater influence on behavior than the law. *Id.* at 937-38.

111. See Hale & Kanowitz, *Woman and the Draft*, 23 HAST. L.J. 199 (1971). See also Brown, *supra* note 89, at 967-79.

proposed, the ERA would subject women to the Selective Service Act; everyone would be eligible for the draft and would be subject to the same set of rules for exemptions and deferments.¹¹² Whether women would be suitable for combat duty would be decided on the basis of individual capacity rather than sex. All standards of physical and mental fitness would have to be equal.

Termination of the draft has redirected some of the discussion toward marked differentials between servicemen and women in enlistment standards, fringe benefits, and vocational training opportunities.¹¹³ After having to meet higher standards to enter the service, women have received fewer vocational training opportunities and fringe benefits. Ratification of the amendment would require equalization of all of the above factors.¹¹⁴

It has been rightfully argued that the only effective means of abolishing sex-based discrimination in the laws of this country would be by passage of a constitutional amendment. Although the judicial trend in the past several years has been toward the eradication of laws which classify on the basis of sex, the equal protection guarantee was not framed to serve this purpose and can contribute only slowly and partially to the cause for equal rights. Likewise, the process of piecemeal legislation could provide only a long and uncertain alternative. In contrast, the ERA would provide an emphatic statement that this nation is committed to the proposition that men and women are equal before the law, and that everyone, regardless of sex, is entitled to enjoy the full range of constitutional guarantees.

As noted at the outset, individuals interested in women's rights need to become aware of the international remedies

112. Although the Equal Rights Amendment as it now stands contains no exceptions for the military, it has been proposed that the draft be exempted. See Brown, *supra* note 89, at 969 n.255.

113. K. DAVIDSON, *supra* note 89, at 110. For a comprehensive review of this topic, see Note, *The E.R.A. and the Military*, 82 YALE L.J. 1533 (1973).

114. *Frontiero v. Richardson*, 411 U.S. 677 (1973), has already begun to compel equalization of federal military benefits. See notes 23-32 and accompanying text *supra*.

An interesting side issue was recently presented in *Anthony v. Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976), where the court ruled that a Massachusetts veterans' preference statute unconstitutionally discriminated against women. The equal protection violation was based on the fact that the statute resulted in an "absolute and permanent preference in the area of public employment to veterans at the expense of women," and that less drastic alternatives to reward veterans were available. *Id.* at 487.

available to aid in the struggle for equality. Thus, an examination of the relevant treaties and conventions is necessary to complement the discussion of the constitutional remedies.

WOMEN'S RIGHTS UNDER INTERNATIONAL LAW

Existing Conventions

General human rights agreements. There are several international agreements in force which broadly proclaim the equality of all persons. The most widely known of these is the United Nations Charter, which is the fundamental source for all international human rights obligations.¹¹⁵ The Charter's preamble makes specific mention of the "equal rights of men and women," putting this principle on the same high level of concern as fundamental human rights and the dignity of the human person. The purposes of the United Nations as set forth in Article 1, are to promote and encourage respect for human rights and for fundamental freedoms regardless of race, sex, language or religion.¹¹⁶

In Chapter IX of the Charter, dealing with international economic and social cooperation, Article 1's general principle of nondiscrimination is reiterated in Article 55(c). In addition, Article 56 states that "[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."¹¹⁷ Action is likewise called for in Article 13, which directs the General Assembly to "initiate studies and make recommendations for the purpose of (b) . . . assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."¹¹⁸

Whereas these and other provisions of the Charter are quite broad and general in scope, Article 8 accords women a specific right—ensuring sexual equality in the hiring practices

115. The United States ratified the Charter on Aug. 8, 1945, 59 Stat. 1031 (1945).

116. U.N. CHARTER art. 1 (emphasis added). Chapter XII, dealing with the International Trusteeship System, reiterates the principles stated in art. 1. *See also id.* art. 62(2) (functions and powers of the Economic and Social Council).

117. The extent to which art. 55 imposes an affirmative obligation on U.N. members has been the subject of considerable divergence of opinion. *See Hudson, Charter Provisions on Human Rights in American Law*, 44 AM. J. INT'L L. 543 (1950); Wright, *National Courts and Human Rights—the Fujii Case*, 45 AM. J. INT'L L. 62 (1951); Note, *Human Rights and Freedoms Provisions of the United Nations Charter*, 3 ALA. L. REV. 158 (1950); Note, *U.N. Charter Invalidates Alien Land Law*, 2 STAN. L. REV. 797 (1950).

118. U.N. CHARTER art. 13 (emphasis added).

of the United Nations' principal and subsidiary organs.¹¹⁹

Another United Nations document, the Universal Declaration of Human Rights,¹²⁰ adopted by a unanimous General Assembly resolution, can be analogized to the Constitution's Bill of Rights. It sets forth the fundamental rights to which all individuals are entitled.¹²¹ The preamble of the Universal Declaration calls to attention the principle of equality as stated in the preamble of the United Nations Charter;¹²² furthermore, Article 2 pronounces the general norm of nondiscrimination,¹²³ which is reinforced by the equal protection provision of Article 7.¹²⁴

119. *Id.* art. 8 states: "The United Nations shall place no restriction on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."

It should be noted that the article's mandate for nondiscrimination has not been evidenced in U.N. practices. For whatever reason, statistics bear out that women are in a distinct minority as U.N. employees, and that the higher the position, the less likely it is that a woman holds it. See Ginsburg, *Introduction to Symposium: The Status of Women*, 20 AM. J. COMP. L. 585, 586 (1972).

In an effort to bring practice more in line with principle, in December, 1975, the General Assembly passed a resolution requesting the Secretary-General to increase the number of women in professional posts. U.N. MONTHLY CHRON., Jan., 1976, at 63.

120. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948) [hereinafter cited as Universal Declaration].

121. The Universal Declaration of Human Rights differs from the United States Bill of Rights in that the latter includes only civil and political rights whereas the former also includes economic, social, and cultural rights. See note 133 and accompanying text *infra*.

This declaration has provided the basis for many of the studies and recommendations later made by the U.N. Comm'n on the Status of Women. See generally Bruce, *Work of the United Nations Relating to the Status of Women*, 4 HUMAN RIGHTS J. 365, 369-70 (1971).

122. The Universal Declaration expressly reminds "the peoples of the United Nations" that they had "reaffirmed their faith in . . . the equal rights of men and women" by signing the U.N. Charter. Universal Declaration, *supra* note 120, at 72.

123. Article 2 of the Universal Declaration states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Id. art. 2, at 72 (emphasis added).

This article has provided a model for other human rights conventions, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force Sept. 3, 1953, 213 U.N.T.S. 221. Article 14 of the European Convention stipulates the same classifications for non-discrimination except that it substitutes "association with a national minority" for Paragraph 2 of Art. 2 of the Universal Declaration. *Id.* at 232.

124. Article 7 provides:

Article 16 of the Universal Declaration, dealing with marriage, refers specifically to "men and women" as opposed to "everyone."¹²⁵ Article 16 was drafted with the intention of condemning national family laws which discriminate on the basis of sex as well as national laws or customs which allow a girl to be given away in marriage before she reaches a proper age or without her consent.

In addition to the United Nations activity, two other broad human rights treaties deserve mention: The International Covenant on Civil and Political Rights (Political Covenant)¹²⁶ and the International Covenant on Economic, Social and Cultural Rights (Cultural Covenant).¹²⁷

The Political Covenant encompasses most of the rights contained in the United States Bill of Rights, but extends well beyond them. Several of its provisions concern women's rights. For example: Article 2(1) provides a broad claim barring discrimination based on sex, among other grounds;¹²⁸ Article 3 requires states who are parties to the covenant to "undertake to ensure the equal right of men or women to the enjoyment of

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Universal Declaration, *supra* note 120, art. 7, at 73.

125. Article 16 states:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Id. art. 16, at 74.

126. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) [hereinafter cited as Political Covenant]. See generally Guggenheim & Defeis, *United States Participation in International Agreements Providing Rights for Women*, 10 LOY. L.A. L. REV. 1, 3-5 (1976) [hereinafter cited as Guggenheim]. The treaty entered into force on Mar. 23, 1976 when 35 ratifications had been recorded.

127. G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 [hereinafter cited as Cultural Covenant].

128. Article 2(1) states:

Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Political Covenant, *supra* note 126, at 53 (emphasis added).

all civil and political rights set forth in [the treaty]"; and Article 26 requires states to provide effective protection against any discrimination.¹²⁹

In addition to its general concern with sex-based discrimination, the Political Covenant also guarantees women certain specific rights, including the right to take part in the conduct of all public affairs, to vote and stand for election, and to have access to public services.¹³⁰ It also requires states "to insure equality of rights and responsibilities of spouses as to marriage, during marriage and at dissolution."¹³¹

The Cultural Covenant guarantees women the same basic rights in the economic, social, and cultural spheres as the Political Covenant does in the civil and political arenas.¹³² Since the United States Bill of Rights predated the recognition of economic, social and cultural rights,¹³³ the rights stipulated in this covenant have no counterpart in the American constitution. However, several of these guarantees have been dealt with by means of legislation,¹³⁴ though they are not considered fundamental constitutional rights in this country.¹³⁵

129. Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id. at 55-56 (emphasis added).

130. Guggenheim, *supra* note 126, at 4.

131. *Id.*

132. Economic rights include the right to work, Cultural Covenant, *supra* note 127, art. 6, at 50; the right to just and favorable conditions of work., *id.* art. 7; and the right to social security, *id.* art. 9. Social rights include the right of everyone to an adequate standard of living, *id.* art. 11; the right to the highest attainable standard of physical and mental health, *id.* art. 12; and the right of everyone to an education, *id.* art. 13, at 51. Cultural rights include the right of everyone to take part in the cultural life, to enjoy the benefits of scientific progress and its application, and to benefit from any scientific, literary, or artistic production of which he is the author. *Id.* art. 15.

133. In the western political tradition, the recognition of economic, social and cultural rights is a distinctively twentieth century concept; thus they were never considered by the framers of the United States Constitution in the eighteenth century. However, certain twentieth century constitutions such as those of Mexico (1903) and the U.S.S.R. (1917) include these rights. Also, African states coming into existence after 1948 have sometimes incorporated provisions of the Universal Declaration into their constitutions.

134. See, e.g., Equal Pay Act, 29 U.S.C. § 206 (Supp. V 1975); Social Security Act, 42 U.S.C. §§ 301-1397f (Supp. V 1975).

135. The United States Supreme Court has expressly repudiated the idea that the right to education or the right to welfare is a fundamental interest requiring the strict scrutiny approach in equal protection cases. *San Antonio Independent School*

Parties to this convention recognize the right to work, the right to just and favorable conditions of work, the right to social security, the right of everyone to an adequate standard of living, the right to the highest attainable standard of physical and mental health, the right of everyone to an education, and the right of all to take part in cultural life, enjoying the benefits of scientific progress and its application, and to benefit from one's own scientific, literary, or artistic production.¹³⁶ Rights dealing with marriage and the family, employment, public health and education are also enumerated.¹³⁷

Two provisions are especially significant in the area of women's rights. Article 3 requires states to "undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth . . . in the Covenant"; likewise, Article 2 guarantees that the rights will be exercised without discrimination of any kind as to sex. Another provision assures equal remuneration for work of equal value, as well as guarantees sexual equality in working conditions.¹³⁸

Both the Political and Cultural Covenants were adopted by resolution of the General Assembly in 1966. Having received the necessary number of ratifications,¹³⁹ the first-mentioned

Dist. v. Rodriguez, 411 U.S. 1 (1973) (right to education); *Dandridge v. Williams*, 397 U.S. 471 (1970) (right to welfare).

136. Guggenheim, *supra* note 126, at 6.

137. *Id.* at 6.

138. Article 7 states:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Cultural Covenant, *supra* note 127, at 50.

139. Thirty-five states were required to ratify these agreements before they came into force. Political Covenant, *supra* note 126, art. 27, at 58; Cultural Covenant, *supra* note 127, art. 27, at 52.

covenant came into force in 1976; the second in 1975. Since these agreements are fairly new, it is difficult to project exactly how much effect they will have on the rights of women in the ratifying countries, a group of nations in which the United States is not included.

Conventions dealing specifically with the rights of women.

In addition to the aforementioned treaties dealing with the rights of all individuals, several conventions are in force which deal specifically with the rights of women.¹⁴⁰

The Convention on the Political Rights of Women was adopted by the General Assembly in 1952, and came into force two years later.¹⁴¹ This treaty has been signed by the majority of members of the United Nations, and finally, by the United States as well.¹⁴² The Convention reflects the belief that "the achievement of full status for women as *citizens* was the key to acceptance of women as equal participants in the life of the community."¹⁴³ Additionally, it provides that women shall be entitled, on equal terms with men, to vote in all elections;¹⁴⁴ to be eligible for election to all publicly-elected bodies established by national laws;¹⁴⁵ and to hold public office and to exercise all public functions established by national law.¹⁴⁶

A second significant convention was adopted by the General Assembly in 1957. The Convention on the Nationality of Married Women,¹⁴⁷ sought to "eliminate the automatic effect on the nationality of the wife of marriage, its dissolution, or the change of nationality by the husband" and to "provide a satis-

140. For a general overview of conventions dealing with women's rights, see COMM'N ON THE STATUS OF WOMEN, INTERNATIONAL INSTRUMENTS AND NATIONAL STANDARDS RELATING TO THE STATUS OF WOMEN, U.N. Doc. E/CN.6/552 (1972).

141. Convention on the Political Rights of Women, *entered into force* July 7, 1954, 193 U.N.T.S. 135 [hereinafter cited as Political Rights Convention]. The Convention was drafted by the United Nations Commission on the Status of Women (Commission). For a study of the Commission's work, see Bruce, *supra* note 121; Guggenheim, *The Implementation of Human Rights by the U.N. Commission on the Status of Women: A Brief Comment*, 12 TEX. INT'L L.J. 239 (1977).

142. The United States ratified the treaty on July 7, 1976. See generally, note 204 *infra*.

143. UNITED NATIONS, THE CONVENTION ON THE POLITICAL RIGHTS OF WOMEN: HISTORY AND COMMENTARY 1, U.N. Doc. ST/SC/27 (1955).

144. Political Rights Convention, *supra* note 141, art. I, at 136.

145. *Id.* art. II, at 138.

146. *Id.* art. III, at 138. One commentator noted that this article presented the greatest difficulties in the preparatory work of drafting the convention. Moreover, several states have made reservations to it on ratifying the Convention. Bruce, *supra* note 121, at 371, 372 n.8.

147. The Convention on the Nationality of Married Women, *entered into force* Aug. 11, 1958, 309 U.N.T.S. 65 (1957).

factory solution to the conflicts of law regarding the effect of marriage on the nationality of the wife."¹⁴⁸

Up to the end of the last century, it had generally been accepted that, when a woman married, she would give up her own nationality, and assume that of her husband.¹⁴⁹ However, it came to be recognized that this could result in the woman losing important personal rights or placing her in the dangerous position of becoming stateless as a result of marriage.¹⁵⁰ The principal thrust of the Convention was directed at these problems. Thus, its first article provides: "Neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife." Similarly, its second article states: "Neither the voluntary acquisition of the nationality of another state nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national." Finally, its third article gives the woman the option of selecting her husband's nationality through "specially privileged naturalization procedures."

In 1962, the General Assembly adopted another convention dealing with marriage. The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,¹⁵¹ had its origin in studies made by the United Nations Commission on the Status of Women as well as a recommendation adopted in 1956 by a conference to abolish slavery.¹⁵² This Convention requires the participating states to provide for consensual marriages,¹⁵³ a specific minimum age for marriage,¹⁵⁴ and the registration of all marriages in an appropriate official register by a competent authority.¹⁵⁵

148. UNITED NATIONS, CONVENTIONS ON THE NATIONALITY OF MARRIED WOMEN: HISTORICAL BACKGROUND AND COMMENTARY 25, U.N. Doc. E/CN.6/389 (1962).

149. This automatic change of nationality on the part of the woman was based on two traditional principles: that the husband was the head of the family, and that there should be unity of nationality of the family. Bruce, *supra* note 121, at 373.

150. *Id.* at 373-74.

151. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, *opened for signature* Dec. 10, 1962, 521 U.N.T.S. 231 [hereinafter cited as *Convention on Marriage*] (*entered into force* Dec. 9, 1974).

152. See Bruce, *supra* note 121, at 375. This conference was convened to prepare the supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. *Id.*

153. Convention on Marriage, *supra* note 151, art. I, at 234.

154. *Id.* art. 2.

155. *Id.* art. 3.

As a complement to the convention dealing with social and political rights, there are a number of existing conventions dealing with the economic rights of women,¹⁵⁶ which have been promulgated by the International Labor Organization (ILO).¹⁵⁷ These conventions center on the rights set forth in Article 23 of the Universal Declaration,¹⁵⁸ and are of two main types: "promotional" conventions, aimed primarily at overcoming economic and social discrimination against women in the world of work; and "protective," which seek to provide women with special protection which it is felt they require because of their biological function of maternity and motherhood.¹⁵⁹

There are three promotional-type conventions worthy of mention. The oldest of the three, the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value,¹⁶⁰ adopted by the ILO in 1951, requires members to ensure the application of the principle embodied in its title.¹⁶¹

Seven years later, the ILO adopted the Convention Concerning Discrimination in Respect of Employment and Occupation.¹⁶² It prohibits "any distinction, exclusion or preference"

156. For a survey of the adoption of laws prohibiting employment discrimination on the basis of sex, see Note, *The Rights of Working Women: An International Perspective*, 14 VA. J. INT'L L. 729 (1974). The author concludes that in most countries, practice has fallen short of legal promise. *Id.* at 729, 733.

157. The ILO was established in 1919 by the Treaty of Versailles and is now the specialized agency of the United Nations concerned with employment. For a detailed study of the history of the ILO, see A. ALCOCK, *HISTORY OF THE ILO* (1971), cited in Guggenheim, *supra* note 126 at 9, 10 & n.73.

158. Article 23 of the Universal Declaration of Human Rights, states:

1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

Universal Declaration, *supra* note 120, art. 23, at 75.

159. Bruce, *supra* note 121, at 378.

160. Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, adopted June 29, 1951, 165 U.N.T.S. 303 (*entered into force* May 23, 1953).

161. Article 2 of the Convention states:

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

Id. art. 2, at 306.

162. Convention Concerning Discrimination in Respect of Employment and Occupation, adopted June 25, 1958, 362 U.N.T.S. 32 (*entered into force* June 15, 1960).

on account of sex that "has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."¹⁶³ The Convention mandates that both national policy and legislation must be brought into line with this principle.¹⁶⁴ Under the provisions of this Convention, however, protective legislation promulgated by the ILO is not deemed to be discriminatory.¹⁶⁵

More recently, the ILO adopted the Convention Concerning Employment Policy,¹⁶⁶ which requires each member to "declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment."¹⁶⁷ Its basic theme is that workers should qualify for employment on the basis of their "skills and endowments . . . irrespective of . . . sex."¹⁶⁸

Other ILO conventions, whose purpose is to protect women from harsh working conditions, are narrower in scope. Examples of such agreements are the Convention Concerning Night Work of Women Employed in Industry¹⁶⁹ and the Convention Concerning Employment of Women on Underground Work in Mines of all Kinds.¹⁷⁰ The first convention prohibits the employment of women, with a few exceptions,¹⁷¹ from working at night. The second generally prevents women from working in underground mines.¹⁷²

As discussed previously, this type of protective labor legis-

163. *Id.* art. 1(1)(a), at 32-33.

164. *Id.* arts. 2, 3, at 34.

165. *Id.* art. 5, at 36.

166. Convention Concerning Employment Policy, adopted July 9, 1964, 569 U.N.T.S. 65 (entered into force July 15, 1966).

167. *Id.* art. 1, at 68.

168. *Id.* See generally Guggenheim, *supra* note 126.

169. Convention Concerning Night Work of Women Employed in Industry, adopted July 9, 1948, 81 U.N.T.S. 147 (entered into force Feb. 27, 1951) [hereinafter cited as Night Work Convention].

170. Convention Concerning the Employment of Women on Underground Work in Mines of All Kinds, adopted June 21, 1935, 40 U.N.T.S. 63 (entered into force May 30, 1937) [hereinafter cited as Convention on Underground Work in Mines].

171. Under the Night Work Convention, *supra* note 169, women of all ages are prohibited from working at night except in a family undertaking, *id.* art. 3, at 150, for a *force majeure*, *id.* art. 4, a serious national emergency, *id.* art. 5, or where the work is "necessary to preserve 'rapidly deteriorating' materials from certain loss." *Id.* art. 4; Guggenheim, *supra* note 126, at 12-14.

172. The Convention Concerning the Employment of Women on Underground Work makes exceptions for women in training, in health and welfare services, in management, and for others who may occasionally enter nonmanual work. Convention on Underground Work in Mines, *supra* note 170, art. 3, at 64-66.

lation has recently come under attack in the United States.¹⁷³ It is viewed as being more discriminatory than protective. Other nations are also closely scrutinizing this type of legislation.¹⁷⁴ The necessity of this legislation is a legitimate subject of inquiry in light of the changing conditions in modern industry or in terms of evaluating workers on the basis of ability, not gender.¹⁷⁵

One plausible reason for such national and ILO legislation is the United Nations Convention Concerning Maternity Protection, that entered into force in 1955.¹⁷⁶ The Maternity Convention was designed to protect the maternal function of women by providing for maternity leave before and after confinement.¹⁷⁷ Despite its admittedly special purpose, it could serve as a detriment to women in two ways: first, employers may be reluctant to hire women of childbearing age as they may become obligated to grant the maternity leave and pay the prescribed benefits; and second, such a law requiring a compulsory leave does not take into account the situation of the individual woman, who may, for a number of reasons, neither desire nor need the leave.¹⁷⁸

The positive factor in the Maternity Convention is that pregnancy is treated like any other temporary disability.¹⁷⁹ In any event, the area of protective labor legislation presents highly controversial issues that involve difficult policy deci-

173. See note 105 and accompanying text *supra*. Protective laws have been condemned as placing restrictions on women in two ways: (1) they absolutely bar women from certain types of work and (2) they may cause employers not to hire women for other types of work because of the special conditions imposed by the employer hiring women. Guggenheim, *supra* note 126, at 15.

174. See generally Note, *supra* note 156, at 730, 746.

175. Bruce, *supra* note 121, at 380. If there exists a need to protect workers from, for example, underground mines, that protection should be accorded to all workers, both male and female.

176. Convention Concerning Maternity Protection, adopted June 28, 1952, 214 U.N.T.S. 321 (entered into force Sept. 7, 1955).

177. Guggenheim, *supra* note 126, at 15 (citing Convention Concerning Maternity Protection, *supra* note 176, arts. 3-6, at 326-28).

178. It is noteworthy that the United States Supreme Court in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974), struck down a mandatory maternity leave for teachers. See notes 35-37 and accompanying text *supra*.

In *LaFleur*, the Court struck down the provision as creating an irrebuttable presumption—i.e., the teachers were not permitted to demonstrate that they were capable of continuing work. This argument is equally applicable to the Maternity Convention.

179. This view has also been adhered to by the EEOC, but as noted previously in notes 54-55 and accompanying text *supra*, the United States Supreme Court in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), did not consider the EEOC's guidelines to be binding and therefore felt at liberty to reach a contrary conclusion.

sions. A satisfactory resolution cannot be expected until women, even when pregnant, are viewed as individuals, with individual needs and abilities, and until significant changes are made in the nature of employment and family services.¹⁸⁰

A final area where women have received special attention is in the area of education. The Convention Against Discrimination in Education was adopted by the United Nations Scientific and Cultural Organization¹⁸¹ in accordance with Article 26 of the Universal Declaration of Human Rights, and guarantees the right to an education.¹⁸² Under this convention, "separate but equal" institutions for members of different sexes are allowed, providing the institutions are of the same quality.¹⁸³ Following the model set forth in the Universal Declaration, the convention requires states to provide free and compulsory primary education, and to make education above this level available and accessible to all.¹⁸⁴ The convention came into force in 1962, and has been ratified by a great number of states, although once again, the United States is not among them.

180. One commentator lists "problems of working women with family responsibilities [that] are indeed difficult," calling for such measures as:

family services, appropriate child-care institutions in both urban and rural areas; general reduction of working hours and more rational organization of the working day; part-time work, if desired, with adequate safeguards to ensure that the conditions of employment are of the same standard as those for full-time workers; and the recognition of motherhood as a social function and, as such, entitled to protection by the State, employers, trade unions, and society as a whole.

Bruce, *supra* note 121, at 381.

181. Convention Against Discrimination in Education, adopted Dec. 14, 1962, 429 U.N.T.S. 93. For a review of the Convention and the right to education in general, see Shelton, *Women and the Right to Education*, 8 HUMAN RIGHTS J. 51 (1975).

182. Art. 26 of the Universal Declaration, states:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full developments of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have the right to choose the kind of education that shall be given to their children.

Universal Declaration, *supra* note 120, art. 26, at 76.

183. Convention Against Discrimination in Education, *supra* note 181, art. 2, at 96-98; see generally Guggenheim, *supra* note 126, at 8-9.

184. Convention Against Discrimination in Education, *supra* note 181, art. 4, at 98-100.

Future Conventions

The Draft Convention. The Draft Convention on the Elimination of Discrimination Against Women (Draft Convention)¹⁸⁵ is the international counterpart to the ERA. Both are intended to supplement and fill in the gaps left by dealing with sex-based discrimination on an issue-by-issue basis, and both would act as a single comprehensive statement that discrimination against women is "incompatible with human dignity."¹⁸⁶

The Draft Convention was recently completed by the Commission on the Status of Women (Commission) and has been submitted to the General Assembly, which is expected to take up consideration of the convention as a matter of urgency during its present session.¹⁸⁷ If the General Assembly adopts the Draft Convention, it will be open for ratification by the member states, and will hopefully enter into force in the near future.

The Draft Convention had its beginning in the Declaration on the Elimination of Discrimination Against Women, which was initiated by the General Assembly and unanimously adopted by 111 states in 1967.¹⁸⁸ Although a declaration does not carry the binding effect of a ratified convention, this declaration received such an overwhelming vote of support that it is thought to carry great moral force and, according to some views, legal force as well.¹⁸⁹

The Declaration's preamble refers to the equal rights provisions of the United Nations Charter and the Universal Declaration of Human Rights, and states that sex-based discrimina-

185. For the text of the Convention, see COMMISSION ON THE STATUS OF WOMEN, REPORT ON THE 25TH SESSION (1974), 56 U.N. ESCOR, Supp. (No. 4) 32, U.N. Doc. E/5451 (1974) [hereinafter cited as 1974 REPORT], see U.N. Doc. E/CN.6/591 (1976) for examples of comments from member states.

186. This principle is stated in the preambles of both the United Nations Charter and the Universal Declaration of Human Rights.

187. See 62 U.N. ESCOR, Supp. (No. 3), U.N. Doc. E/5909 (1977). In accordance with U.N. procedure, upon completion of the Draft Convention, the Commission on the Status of Women forwarded the document to the Economic and Social Council, which readily approved it and forwarded it to the General Assembly for adoption. See 62 U.N. ESCOR, U.N. Doc. E/RES/2058 (1977).

188. See Declaration on the Elimination of Discrimination Against Women, G.A. Res. 2263, 22 U.N. GAOR, Supp. (No. 16) 35, U.N. Doc. A/6716 (1967) [hereinafter cited as Declaration on Discrimination]. Work began in 1963 when the General Assembly noted in a resolution that there still remained considerable discrimination against women, in fact if not in law, and asked the Comm'n on the Status of Women to prepare a draft to eliminate it. Introductory Statement of the U.N. Office of Public Information, OPI/297-05287-April 1968-50M.

189. Guggenheim, *supra* note 126, at 21-22.

tion "is an obstacle to the full development of the potentialities of women in the service of their countries and humanity." The first article sets forth the Declaration's underlying premise: "[d]iscrimination against women . . . is fundamentally unjust and constitutes an offence against human dignity." The second article calls for the abolition of national laws, customs, regulations, and practices which discriminate against women, and calls for the ratification of international instruments which work toward this purpose.¹⁹⁰

Several following articles then set out the civil, political, economic, social and cultural rights of women,¹⁹¹ which have been stated in previous conventions and which are for the most part reiterated in the Draft Convention. The final article urges implementation of the principles set forth in the Declaration by all individuals, governments, and nongovernmental organizations.¹⁹²

The Draft Convention represents the Commission's decision to denounce sex-based discrimination in a single convention.¹⁹³ Copies of the draft were forwarded to member governments, who in turn sent their comments to the Commission. Though these recommendations were accorded considerable weight, it appears that the final form of the Convention does not vary greatly from the version originally conceived by the Commission.¹⁹⁴

The Draft Convention's scope also reflects the Commission's view that only the fundamental aspects of women's rights should be covered, avoiding the more detailed provisions already embodied in existing conventions.¹⁹⁵ Thus, Article 1(1) provides a broad proscription against all sex-based discrimination.¹⁹⁶ In line with this view, discrimination is outlawed in

190. Declaration on Discrimination, *supra* note 188, art. 2, at 36.

191. The enumerated rights include: the right to vote, hold public office and exercise all public functions (art. 4); the right to maintain one's nationality upon marriage (art. 5); the right to property and equality of legal capacity, as well as the equal status of husband and wife (art. 6); the right to equal treatment under national penal codes (art. 7); right to equality in education (art. 9); the right to equality in economic and social life, as well as the right to have the proper services provided in the event of maternity (art. 10). *Id.* at 36-38.

192. *Id.* art. 11, at 37.

193. 1974 REPORT, *supra* note 185, at 31.

194. See McDougal, Lasswell, & Chen, *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT'L L. 497, 517-18 (1975).

195. *Id.* at 518.

196. Article 1 of the Convention, which was evidently derived from the Conven-

several crucial areas where women have traditionally lacked an equal footing with men.¹⁹⁷ Similarly, parties to the Convention must initiate reforms to eliminate sex-based discrimination in all its forms¹⁹⁸ and work toward the education of public opinion in an effort to eliminate prejudice.¹⁹⁹

In keeping with the general premise that sex discrimination must be eradicated, a General Assembly resolution proclaimed the year 1975 "International Women's Year."²⁰⁰ A World Conference took place in Mexico City from June 19 to July 2 of that year, at which the years 1976 through 1985 were designated the "United Nations Decade for Women and Development."²⁰¹ The themes of this decade are equality, development and peace, and as with the Draft Convention, all individuals, governments and organizations have been urged to act jointly and separately, within their particular spheres of interest, to implement the principle of sexual equality.

Foreign Conventions—The Argument for Ratification

It is indeed curious that the United States, which purports to place great value upon the guarantees provided by its own Constitution, and which advocates the democratic system as a

tion on the Elimination of Racial Discrimination, *adopted* Mar. 7, 1966, 660 U.N.T.S. 195 states:

In this Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect of or the purpose of nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural or any field of public life.

1974 REPORT, *supra* note 185, art. 1, at 34.

197. Article 8 of the Draft Convention insures the right to equal opportunity to participate in the political and public life of the country. This includes the right to hold public office and participate in the formulation of government policy, as well as nongovernmental organizations and associations. *Id.* art. 8, at 36-37.

Economic rights include the right to equal employment opportunity as well as equal remuneration and vocational training. *Id.* art. 11, at 38-39.

Equal educational opportunity also encompasses equal opportunity to benefit from scholarships and continuing education programs, as well as access to information "to help in insuring the health and well-being of families." *Id.* art. 10, at 37-38.

Article 15 requires that women receive equality before the law. *Id.* art. 15, at 41.

Article 16 requires that marriage be an institution consisting of two partners with equal rights. It also embodies the principle of consent. *Id.* art. 16, at 42. In addition, the Draft Convention asserts that "the protection of motherhood is a common interest of the entire society which should bear the responsibilities for it." *Id.* art. 5(1), at 36.

198. *Id.* art. 2, at 34-35.

199. *Id.* art. 5, at 36.

200. G.A. Res. 3010, 27 GAOR, Supp. (No. 30) 67, U.N. Doc. A/8730 (1972).

201. REPORT OF THE WORLD CONFERENCE OF THE INTERNATIONAL WOMEN'S YEAR, U.N. Doc. E/CONF.66/34 (1976).

model for other countries, has for so long refused to ratify human rights conventions. Of the foregoing conventions extolling equal rights, the United States is a party to only the United Nations Charter, the International Agreement for the Suppression of White Slave Traffic and, most recently, the Convention on the Political Rights of Women.²⁰² Although opponents of ratification have used a number of arguments to conclude that the United States lacks constitutional power to accede to these treaties,²⁰³ it appears that the impediment is based on policy rather than law.

Fortunately, there are evidences of a reversal in this trend. The ratification of the Political Rights Convention, although it does not provide any new rights,²⁰⁴ is one indication; another is the increased emphasis that the Carter administration is placing on human rights in the formulation of its foreign policy. Ratification of the Convention on the Elimination of Discrimination Against Women and other human rights conventions would serve the dual purpose of aiding in the struggle to abolish sex-based discrimination as well as improving the American image abroad.²⁰⁵

Due to the uncertainty of the Supreme Court's stance on women's rights, and recalling that treaties carry the force of federal legislation,²⁰⁶ the signing of these conventions would place equal rights advocates on a sounder footing. Additionally, conventions such as the ones dealing with the political rights of women and equal remuneration for work of equal

202. Guggenheim, *supra* note 126, at 1, 22.

203. See Guggenheim, *supra* note 126, at 23-41. The authors discuss the three main arguments that opponents of United States ratification of international conventions have employed: (1) that these treaties involve matters within the domestic jurisdiction of the United States; (2) that they involve the reserved powers of the states; and (3) that they are not of international concern. The authors convincingly rebut all of these rationales and then conclude with a quote from a study by the President's Commission for the Observance of Human Rights Year, wherein Justice Clark stated:

[t]he President, with the United States Senate concurring, may, on behalf of the United States under the treaty power of the Constitution ratify or adhere to any human rights convention that does not contravene a specific constitutional prohibition

Id. at 41.

204. The nineteenth amendment, unlike the Convention on the Political Rights of Women, is silent on the right to run for and hold public offices; however, today in the United States, if this right were denied, it would constitute an equal protection violation. *Id.* at 44.

205. *Accord, id.* at 67.

206. See U.S. CONST. art. VI. Treaties and federal law are equal under the Constitution. Since neither is superior, the later one in time prevails.

value could serve to reinforce existing legislation.²⁰⁷ Since the conventions dealing with protective labor regulations²⁰⁸ appear to contradict contemporary legal opinion, these need not be ratified.

Significantly, the signing of certain agreements could also expand the rights of the American woman. For example, the Convention Concerning Discrimination in Respect of Employment and Occupation is broader than Title VII in that it applies to everyone, and requires states to take affirmative action to end discrimination.²⁰⁹ However, since the concept of affirmative action is now very controversial in this country,²¹⁰ the United States might consider making an appropriate reservation to avoid contradiction with future domestic law.

The concept of permissive affirmative action would also have to be dealt with if the United States signs any treaties dealing with economic, social or cultural rights. As stated earlier, only civil and political rights are encompassed in our Constitution; nondiscrimination in this context is generally acknowledged to mean that the state must *abstain* from abridging the guaranteed rights. An example would be the nineteenth amendment's mandate that the right to vote may not be denied or abridged on account of sex. If the United States signs the Draft Convention on the Elimination of Discrimination Against Women, it demands that the state *act* to recognize motherhood as a social function.²¹¹

In order to comply with this provision, state aid would be a prerequisite.²¹² Although several countries, *e.g.*, France, Israel, the Soviet Union, and Sweden, provide for this type of aid,²¹³ such intervention runs counter to present American constitutional thought. This factor would have to be dealt with in any of the aforementioned conventions dealing with economic, social or cultural rights. The United States should therefore carefully scrutinize what kind of action ratification of these treaties would entail before setting any precedent.

Despite these difficulties, it is hoped that the Senate will

207. See notes 141-46, 160-61 and accompanying text *supra*.

208. *E.g.*, Night Work Convention, *supra* note 169; Convention on Underground Work in Mines, *supra* note 170.

209. Guggenheim, *supra* note 126, at 67.

210. See, *e.g.*, note 71 *supra*.

211. 1974 REPORT, *supra* note 185, at 36 (art. 5(1)).

212. Shelton, *supra* note 181, at 67-69.

213. Ginsburg, *supra* note 119, at 588.

give careful consideration to the conventions outlined in this comment. Understandably, the general human rights treaties will entail a discussion of issues other than the prohibition against sex-based discrimination. However, it is hoped that careful attention will be given to the treaties dealing specifically with the rights of women in light of the rights already granted to American women under national law, with a view toward their expansion.

Finally, it is hoped that the United States will devote careful consideration to the Convention on the Elimination of Discrimination Against Women. It is encouraging that the United States was represented and proposed amendments at the last meeting of the working group which discussed the convention.²¹⁴ In light of the precarious position in which the ERA has been placed, this Convention may have to replace a constitutional amendment as the broad and definitive prohibition against sex-based classifications. However, with or without the ratification of an equal rights amendment or an international convention, American lawyers litigating these cases should be aware that treaty law has at its foundation the principle of nondiscrimination. Therefore, even if the United States fails to formally incorporate the international norm into its body of law, it could be strongly argued that such treaties, which have been acceded to by so many nations, form a part of customary international law, which is also the law of the United States.²¹⁵

CONCLUSION

In the United States, individuals concerned with women's rights continue to strive toward the goal of equal treatment between the sexes. Currently, this struggle is dramatized by the somewhat polarized debate over the proposed ERA. With the fate of the amendment uncertain, some supporters have begun to look elsewhere for other weapons which can be utilized in the fight for equality.

Clearly, one alternative to the ERA is relief through the courts. Unfortunately, United States constitutional law has not provided a sweeping pronouncement against sex-based discrimination. The Supreme Court's issue-by-issue approach, characterized by varying levels of scrutiny, has been unwilling

214. See, e.g., U.N. Doc. E/CN.6/L716/Add.1, at 10 (1977); U.N. Doc. E/CN.6/L681/Add.1, at 1, 5 (1977).

215. See McDougal, *supra* note 194, at 528 n.241.

to recognize complete equality as the eventual goal—subject only to some well-reasoned exceptions.

A push for ratification of the many existing international conventions and the proposed Draft Convention could prove to be a more fruitful alternative. International legislation promoting equality has been much more wide ranging than United States efforts. If these conventions were to become part of our national law, the status of women would be considerably improved.

In any event, regardless of its form, a prohibition against all forms of sex-based discrimination needs to be adopted. Without such a prohibition, women will retain a legally inferior status. There is no compelling reason for such a status to be the rule rather than the exception.

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